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No. 03-281

In The
Supreme Court of the United States

Consumers Union of United States, Inc.
Petitioner,

v.

Suzuki Motor Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE FOR HIGHWAY SAFETY

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Respondents.

BRIEF OF *AMICUS CURIAE* INSURANCE INSTITUTE FOR HIGHWAY SAFETY

In Support of Petitioner

INTEREST OF *AMICUS CURIAE*

The Insurance Institute for Highway Safety (the Institute) is a nonprofit research and communications organization that identifies and develops ways of reducing motor vehicle-related deaths, injuries, and property damage. The Institute submits this brief *amicus curiae* in support of Consumers Union's Petition for a Writ of Certiorari.[1]

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[1] The Insurance Institute for Highway Safety accepted no monetary contribution for the preparation or submission of this brief, which was written in its entirety by house counsel.

The Institute is supported by the nation's principal automobile insurance companies. The research program of the Institute covers all facets of the highway loss problem, including human, vehicle, and environmental factors. Institute research findings and publications are cited by academic, government, business, and private sector organizations concerned with transportation safety both in the United States and abroad.

The Institute has been a principal source of independent testing and rating information for consumers on the relative safety of vehicles. The Ninth Circuit's decision poses a significant risk to the Institute and other independent organizations by subjecting them to financially devastating lawsuits filed by manufacturers that do not like the results of tests of their products. Accordingly, the Institute supports Consumers Union's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Public ratings of consumer products by independent organizations provide an important public benefit by giving consumers comparative information about the relative safety and other differences among products to allow them to make more informed purchasing decisions. In addition, these programs benefit the public by encouraging manufacturers to improve their products in order to get better ratings. The independent testing and rating of the safety of passenger vehicles arguably are the most important of these consumer information programs. Vehicle testing programs in the United States, Europe, Australia, Japan, and Sweden have directly produced important safety improvements in vehicle crashworthiness, handling, and stability. These programs also have encouraged development of new technologies to promote belt use and decrease pedestrian injuries

and have identified safety-related defects in motor vehicles. Some of these testing programs are conducted by national or local governments, but others are conducted by nongovernment groups such as Consumers Union and the Insurance Institute for Highway Safety (the Institute). These nongovernmental groups will be unable to continue testing if deep-pocketed vehicle manufacturers are able to frivolously use expensive and prolonged lawsuits to suppress the results of these ratings programs. If a rating organization can show by competent evidence that its test procedures and results are objective, it should be allowed to continue conducting its programs and widely publicizing the results without fear of facing lengthy and financially devastating trials in meritless suits filed by manufacturers that do not like the results for their products.

ARGUMENT

I. CRASHWORTHINESS RATING PROGRAMS CREATE INFORMATION ON THE RELATIVE PERFORMANCE OF VEHICLES TO ENCOURAGE MANUFACTURERS TO DESIGN SAFER VEHICLES.

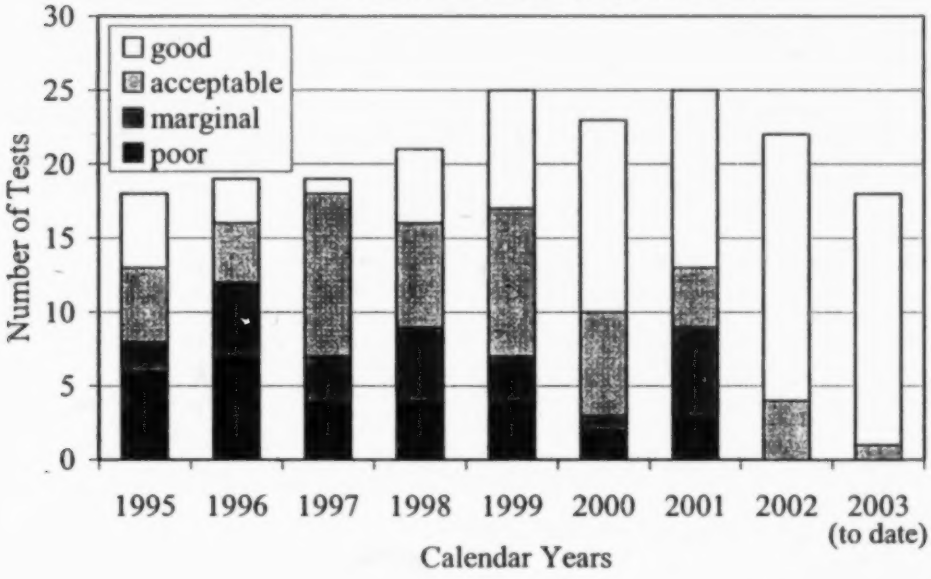
A. Vehicle manufacturers have responded to independent crashworthiness evaluations both in the United States and abroad by improving their vehicles.

Since 1995 the Institute has been rating and comparing vehicle performance in 40 mph frontal offset tests. In the test, which simulates a frontal impact in which the driver side of one vehicle strikes the driver side of a vehicle with the same mass, the Institute evaluates the structural performance of the vehicles (how well the safety cage around the driver remains intact during the impact); the potential

for serious head, neck, chest, and lower limb injuries in the crash; and driver kinematics (how well the airbag and lap/shoulder belt work together to control movement of the test dummy during the impact). Each vehicle is assigned a rating of good, acceptable, marginal, or poor. These ratings are widely distributed by the Institute to consumers, the media, and other organizations.

As shown in the following figure, when the Institute first began rating vehicles in 1995, few were rated good and many were rated poor. As a result of the ratings program, vehicle manufacturers have improved their vehicles' structural and restraint system performances to reduce the possibility of driver injuries. Thus by the 2002 model year, all of the vehicles tested were either good or acceptable. That same trend applies for the 2003 models the Institute has tested. This means newer model passenger vehicles will more effectively protect their occupants against serious injuries in high-severity frontal crashes than vehicles of a few years ago.

Crashworthiness Evaluations, 1995-2003



The success of the Institute's ratings program in improving vehicle safety is similar to what has been achieved by vehicle crashworthiness ratings programs in Europe, Australia, and Japan. In Europe a coalition of private organizations, such as automobile clubs, and national safety agencies, such as the U.K. Department of Transport, has been conducting 40 mph frontal offset and other tests to rate vehicles as a part of the European New Car Assessment Program (EuroNCAP). In addition, the German automobile magazine *Auto Motor and Sport* conducts and publicizes its own 40 mph frontal offset test to rate vehicles. Like Consumers Union and the Institute, *Auto Motor and Sport* receives no government funding for its tests. In Australia a coalition of private organizations, including automobile clubs and insurers, and the Australian federal government and some state governments have been conducting 40 mph frontal offset and other tests as a part of the Australian New Car Assessment Program. In Japan the National Organization for Automotive Safety & Victim's Aid and the Ministry of Land, Infrastructure, and Transport have been conducting 40 mph frontal offset tests to rate vehicles as a part of the Japan New Car Assessment Program. These programs have brought about similar improvements in vehicle frontal crashworthiness performance.[2] For example in 1997, when EuroNCAP first began its frontal offset ratings program, only one model received a four-star rating, the highest rating in the EuroNCAP program. By 2002 four-star performance had become the norm as manufacturers improved their designs.[3]

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[2] Crashtest.com, *Introduction to Auto Safety & Crash-Testing, at* http://www.crashtest.com/intro/intro.htm.

[3] *EuroNCAP Results Spur Improvements in Crashworthiness*, Status Rep., (Ins. Inst., Arlington Va.), Feb. 9, 2002, at 4.

B. Vehicles that perform well in crashworthiness evaluations protect vehicle occupants in real-world crashes.

Research shows that vehicles that are good performers in independent vehicle ratings programs also protect people in real crashes. Researchers at the Swedish National Road Administration and Australia's Monash University found that drivers of vehicles that earn ratings of four stars in EuroNCAP crash tests are about 30 percent less likely to be severely injured in crashes than drivers of cars with one-star ratings.[4]

C. Vehicle ratings programs encourage additional safety improvements.

Improved Handling and Stability. In addition to the handling and stability ratings from Consumers Union, other organizations routinely test and rate the handling and stability performance of vehicles. These ratings programs have brought about important improvements in vehicle stability. For example, the Swedish consumer magazine *Teknikens Varld* regularly tests the handling and stability of vehicles in test maneuvers that simulate motorists having to make sudden lane change maneuvers to evade moose in the road. Moose-vehicle impacts are a source of serious and fatal injuries in many Scandinavian countries and elsewhere in the world. In 1997 this organization tested the newly introduced small A-class car made by Daimler-Benz. During the test the vehicle rolled over, and the magazine published the results with the obvious criticism of the vehicle's stability.

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[4] Anders Lie & Claes Tingvall, *How Do EuroNCAP Results Correlate with Real-Life Injury Risks?*, 3 Traffic Inj. Prevention 288 (2002).

Unlike Suzuki, Daimler-Benz did not think litigation was the solution to this problem. Instead it halted production of the A-class and reengineered the car's suspension and installed electronic vehicle stability systems.[5]

Increased Seat Belt Use. Vehicle ratings programs encourage manufacturers to introduce innovations in vehicle safety systems that are not required by governmental safety standards. The EuroNCAP program recently has begun providing vehicle manufacturers with an incentive to adopt seat belt reminder systems that encourage vehicle occupants to use their seat belts. The systems are especially targeted to people who forget to buckle up or for whatever reason use a belt only occasionally. Recent Institute research has shown that the seat belt reminder system introduced by Ford in some 2000 models, most 2001 models, and all 2002 models in the United States has raised belt use among drivers of those vehicles to 76 percent, compared with 71 percent among drivers of vehicles without the system.[6] By encouraging manufacturers to voluntarily install these systems, independent vehicle ratings programs can bring about an improvement in seat belt use rates.

Improved Pedestrian Protection. EuroNCAP has begun testing vehicles to measure how well they provide protection to adult and child pedestrians struck at 25 mph. Various impact sites on the front of the car are rated fair, weak, or poor, and the vehicles are assigned a separate star

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[5] Niki Lauda, Fastlane.com, *A-Class is Safe in All Situations*, (Dec. 18, 1997), *at* http://www.fastlane.com.au/News/A-class.htm. *See also*, Mercedes-Benz, *New Chassis Tuning at* http://www.mercedes-benz.com/ e/cars/a-class/fahrwerk.htm, (on www as of Aug. 17, 2003) (on file with Ins. Inst.).

[6] Allan F. Williams, JoAnn K. Wells & Charles M. Farmer, *Effectiveness of Ford's Belt Reminder System in Increasing Seat Belt Use*, 8 Inj. Prevention at 293 (2002).

rating for pedestrian protection. Because of these EuroNCAP tests, manufacturers are implementing more pedestrian-friendly designs, not only on models sold in Europe but also on vehicles sold in the United States. For example, the 2001 Honda Civic earned the highest rating given thus far by EuroNCAP for pedestrian protection, and most of the improvements incorporated in those vehicles also are found in Civics sold in the United States.[7]

Improved Infant and Child Restraints and Attachment Systems. Independent ratings programs have been a valuable source of information to consumers about the safety of child restraints. Since the early 1970s Consumers Union has conducted simulated crash tests of child restraints to provide consumers with information about the relative performance of those restraints in providing protection to children.[8] At the time Consumers Union began its testing, the existing federal motor vehicle safety standard did not use a simulated crash test to evaluate child and infant restraint performance. It was nearly 10 years after Consumers Union began its testing that such a test was required by the federal government.[9]

The Institute recently evaluated the federally required special attachments designed to make it easier to anchor

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[7] E-mail from Yoshiji Kadotani, Chief Engineer & Technical Representative for Safety, American Honda Motor Co., Inc., to Joseph Nolan, Vice President, Research, Ins. Inst. (Sept. 4, 2003, 17:59 EST) (on file with Ins. Inst.). *See also*, Richard Truett, *Protecting Pedestrians*, Automotive News DESIGN, http://www.autonews.com/article.cms?articleID=45045&a=a&bt=pedestrians&arc=n (Sept. 8, 2003).

[8] *Crash Tests of Car Safety Restraints for Children*, Consumer Rep., Aug. 1972, at 484.

[9] The original child restraint standard (49 C.F.R. § 571.213) went into effect on April 1, 1971. Dynamic testing was not required until January 1, 1981, (48 Fed. Reg. 36849) (Aug. 15, 1983).

infant and child restraints in vehicles. In its study of 50 vehicles, the Institute found that the new federal rule is helping, but not solving, infant and child restraint installation problems.[10] As a part of its overall evaluation of new vehicles, Consumers Union also is evaluating the ease of use of infant and child restraints in vehicles.[11] By identifying the relative ease of use of the various infant and child restraint attachment systems by make and model of vehicle, the Institute and Consumers Union ratings programs will bring pressure on manufacturers to improve those designs.

II. VEHICLE RATINGS PROGRAMS PROMPTLY IDENTIFY SAFETY-RELATED DEFECTS, ALLOWING MANUFACTURERS TO TAKE IMMEDIATE REMEDIAL ACTION.

In addition to bringing about improvements in vehicle designs, vehicle ratings programs have identified safety-related defects in vehicles. These findings have lead to recalls of those vehicles. For example, the Institute recently tested the 2004 Toyota Sienna in a 40 mph frontal offset crash test and discovered a leak from the fuel tank after the crash. As a result, Toyota identified a manufacturing problem and recalled more than 34,000 Siennas to replace the fuel tanks in those vehicles. Likewise, Isuzu recalled more than 18,000 of its 2000 and 2001 Trooper models to correct

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[10] News Release, Insurance Institute for Highway Safety, *LATCH Systems for Child Restraints Aren't Always a Snap: Not Every Child Restraint Will Work in Every Vehicle*, (June 11, 2003) (on file with Ins. Inst.).

[11] Statement of David Pittle, Consumers Union Senior Vice President for Technical Policy, Nat'l Highway Traffic Safety Administration, Ease-of-Use Press Conference, (June 11, 2003), *available at* http://www.nhtsa.dot.gov/real/pc061103.html.

a fuel line defect identified in the Institute's 40 mph frontal offset crash. Jeep recalled 102,000 of its 2002 Liberty models and Nissan recalled more than 116,000 of its 2002 Altima models to fix airbag problems identified in the Institute's offset crash test. Volkswagen recalled more than 36,000 of its 1999 Golf and Jetta models to fix a fire-related problem with the insulation that was detected in an Institute crash test.[12] Finally the National Highway Traffic Safety Administration is investigating a potential safety-related problem with the fuel tanks of 2004 Mazda6 vehicles.[13] The potential problem was identified during a pre-crash inspection of the vehicle by Institute staff. By identifying these safety-related defects, the Institute's vehicle ratings program has brought pressure on manufacturers to initiate safety-related recall campaigns that will bring about prompt corrections of the problems.

III. LITIGATION COSTS PUT INDEPENDENT RATINGS PROGRAMS AT RISK.

As demonstrated above, independent vehicle testing and ratings programs provide significant benefits to the public by encouraging vehicle manufacturers to make safety improvements to their vehicles. As a result of the Institute's well-publicized frontal offset crash test program, EuroNCAP, Australian NCAP, and the Japanese NCAP,

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[12] Nat'l. Highway Traffic Safety Admin., http://www-odi.nhtsa.dot.gov/cars/problems/recalls/results.cfm. NHTSA Campaign ID Nos. 03V291000 (Sienna); 00V376000 (Trooper); 01V373000 (Liberty); 02I001000 (Altima); 99V022000 (Golf and Jetta). *See also*, Letter from Toyota Motor North America, Inc. to the Nat'l. Highway Traffic Safety Admin. (Aug. 11, 2003) (on file with Ins. Inst.).

[13] Telephone interview with William Duckwitz, Safety Defects Specialist, the Nat'l. Highway Traffic Safety Admin., Office of Defects Investigation (Sept. 9, 2003).

there have been significant improvements in the structural and restraint system performances of vehicles. EuroNCAP also is promoting the installation of reminder systems to promote belt use and increase pedestrian protection in vehicle impacts. Consumers Union and Institute tests of infant and child restraints and their vehicle attachment points will help bring about improvements to make it easier to attach restraints to vehicles. Ratings programs also have been a valuable source of information to the National Highway Traffic Safety Administration on vehicle-related defects. Finally, handling and stability programs conducted by Consumers Union and others are putting pressure on manufacturers to reduce the rollover propensity of their vehicles.

All of these important public benefits would be jeopardized if objective ratings programs are subjected to the threat of essentially frivolous lawsuits by manufacturers whose vehicles do not perform well. As long as the programs disclose their test procedures and there is no competent evidence of deliberate misrepresentation of results, they should not be subject to prolonged and expensive litigation. In his dissent in *Suzuki Motor Corp. v. Consumers Union*, Judge Kozinksi correctly set out the dilemma faced by Consumers Union, the Institute, and other testing and ratings organizations and the consequences for consumers:

> If CU can be forced to go to trial after this thorough and candid disclosure of its methods, this is the death of consumer ratings: It will be impossible to issue a meaningful consumer review that a band of determined lawyers can't pick apart in front of a jury. The ultimate losers will be American consumers denied access to independent information about the safety and usefulness of products they buy with their hard-earned dollars. Pet. App. 49a-50a.

To preserve the ability of independent organizations to provide the public with objective information about the relative performance of different vehicles, the Institute requests the Court to grant Consumers Union's Petition for Certiorari and to overturn the decision of the United States Court of Appeals for the Ninth Circuit.

CONCLUSION

The Court should issue a Writ of Certiorari as requested by Consumers Union.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2003, I served three copies of the foregoing brief of *amicus curiae* upon the parties by first class mail, postage prepaid to the following:

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